90-923

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

BILLY LAMB and CARMON WILLIS

Petitioners,

VS.

PHILIP MORRIS, INCORPORATED,

and

B.A.T. INDUSTRIES, PLC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an implied private right of action exist under the Foreign Corrupt Practices Act of 1977, as codified at 15 U.S.C. §§78dd-1, 78dd-2?

2. Does the Foreign Trade Antitrust Improvements Act of 1982, as codified at 15 U.S.C. §6a (1982), make more stringent the jurisdictional standard for an antitrust complaint alleging a conspiracy to fix prices of imported commerce?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Billy Lamb and Carmon Willis, and the respondents Philip Morris, Inc. and B.A.T. Industries, PLC. Katherine Graddy was an original plaintiff before the United States District Court for the Eastern District of Kentucky, but she did not join in the appeal to the United States Sixth Circuit Court of Appeals.

The respondents before this Court include Philip Morris, Inc. and B.A.T. Industries, PLC.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

The petitioners, Billy Lamb and Carmon Willis respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceedings on September 29, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 915 F.2d 1024, and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decision of the United States District Court for the Eastern District of Kentucky (Reed, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 1b, infra.

JURISDICTION

Invoking federal jurisdiction under the Sherman Act, 15 U.S.C. §1 et seq., the Clayton Act, 15 U.S.C. §12 et seq., and the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-1 et seq., and the general jurisdictional and venue statutes codified at 28 U.S.C. §1337 and 15 U.S.C. §15 et seq., the petitioners and Katherine Graddy brought this suit in the Eastern District of Kentucky. On June 28, 1989,

the Eastern District dismissed petitioners' complaint on grounds that it was barred by the Act of State Doctrine and for the additional reason that there is no private cause of action under the Foreign Corrupt Practices Act (FCPA). See p. 1b, infra.

On petitioners' appeal, the Sixth Circuit on September 28, 1990 entered a judgment and opinion reversing the Eastern District's judgment insofar as it was based upon The Act of State Doctrine, but sustaining the District Court's decision that there is no implied private right of action under the FCPA. The Sixth Circuit remanded the case for further ruling on the antitrust claims. See p. 1a, infra. No petition for rehearing was sought.

The jurisdiction to review the judgment of the Sixth Circuit on its affirmance of the District Court as regards the issue of the private right of action under the Foreign

Corrupt Practices Act (FCPA hereinafter) is invoked under 28 U.S.C. §1254 (1).

The jurisdiction to review the issue involving the Foreign Trade Antitrust Improvements Act (FTAIA hereinafter) is likewise invoked under 28 U.S.C. §1254 (1), and on the additional grounds that the Supreme Court may exercise jurisdiction where: (1) the issue is an essential predicate to an Intelligent resolution of other pendant issues: (2) the issue was fully briefed for both the District Court and the Court of Appeals; and (3) the issue is a matter of crucial first impression for most future antitrust cases with foreign commerce implications. Cf. Dandridge V. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 1153 (1970); Vance V. Terrazas, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980); New York City Transit Authority V. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed. 2d 587 (1979); Regents of the University of California V. Bakke, 438 U.S. 265, 98 S.Ct.

2733, 57 L.Ed.2d 750 (1978).

STATUTES INVOLVED

1. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-1 and 78dd-2 prohibits an "issuer" or a "domestic concern" from the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to --"

(1) "any foreign official";

(2) "any foreign political party or official thereof or any candidate for foreign political office"; or

(3) "any person, ..." while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office,"

for purposes of:

(A) (i) influencing any act or decision of such person or foreign official, etc. in his official capacity, or (ii) inducing such a person or foreign official, etc. to do or omit to do any act in violation of the official duty of such official, or

(B) inducing such person or foreign official, etc. to use his or its influence with a foreign government or instrumentability therof to affect or influence any act or decision of such government or instrumentality,

in order to assist such [issuer] [domestic concern] in obtaining business for or with, or directing business to, any person.

2. The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §6a states:

[The Sherman] Act shall not apply to conduct involving trade or commerce (other than import trade or commerce),

with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, or a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury

to export business in the United States.

STATEMENT OF THE CASE

This is a class action brought by three Kentucky tobacco growers on behalf of growers in eight Central Kentucky counties. Their complaint alleges that certain activities by the respondents in the United States and in various foreign countries, epitomized by a written contractual agreement involving appellants and citizens of the nation of Venezuela have unlawfully and harmfully affected their ability to market their tobacco by, inter alia, increasing the flood of under-valued imported tobacco into this country in competition with their product. The district court, in its opinion, states that the contract was signed in Venezuela, which is not a fact in evidence nor admitted by the plaintiffs, and it omits that Respondents' alleged wrongdoing involving the Venezuelan written

contract was but one of a number of alleged similar arrangements in which the respondents were involved. The United States Department of Justice, Federal Bureau of Investigation letter of April 6, 1983, filed as an exhibit below, contains the following language in its discussion of the Venezuelan contract:

> =======has received reliable information, which indicates similar transactions have occured between the abovementioned tobacco companies and the countries of Argentina, Mexico, Brazil, Nicaragua and Costa Rica.

Petitioners alleged specifically that on or about May 14, 1982, subsidiaries of respondents herein entered into a contract which violated the Sherman Antitrust Act, as amended, (15 U.S.C. §1, et seq.), the Clayton Act, as amended (15 U.S.C. §12, et seq.), the Robinson-Patman Act, as amended (15 U.S.C. §13 et seq.), and the Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§78dd-1 and 78dd-2). In particular, C.A. Tabacalera National ("CATANA"), a subsidiary of Philip Morris, and C.A. Cigarrera Bigott, SUCS, ("Bigott"), a subsidiary of

B.A.T. entered into a contract with La Fundacion Del Nino (Children's Foundation) of Caracas, Venezuela. Ostensibly, La Fundacion is a private charitable organization that engages in educational and other philanthropic activities on behalf of children who live in the tobacco-growing regions in Venezuela and is headed by the wife of the then president of Venezuela. The contract provided that respondents' subsidiaries would make periodic "donations" in the amount of approximately $12.5 million to the Children's Foundation in exchange for the following consideration by the government of Venezuela: (1) price controls on the future minimum wage paid to workers on respondents' tobacco plantations and factories in Venezuela; (2) no price controls concerning the retail prices these tobacco companies could charge for their cigarettes; (3) the amount of the "donations" made to the Children's Foundation would be deductible from the gross income of

of the tobacco companies for tax purposes; and (4) the tax rates "that affect the manufacture, sale, distribution and commercialization of cigarettes" in effect at the time the tobacco companies entered into this contract with the Children's Foundation (May 14, 1982) would remain unchanged. Petitioners allege that this agreement between these tobacco companies and the Children's Foundation violated the anti-trust laws of the United States because it had an adverse impact on appellants' ability to sell their tobacco on the tobacco markets in central Kentucky. In particular, the agreement created a knowing inducement for a discrimination in price clearly forbidden by 15 U.S.C. §13(c) and (f) of the Robinson-Patman Act.

In sum, the gravamen of the complaint is that by virtue of the tobacco companies' contract with the Children's Foundation in Venezuela, the respondents were able to meet their demand for tobacco by importing increased

quantities of less expensive tobacco from Venezuela and elsewhere, thereby reducing the amount of domestic tobacco purchased by the respondents, such as the burley tobacco grown by the peitioners, which, due to this decreased demand, ultimately had the effect of lowering the price petitioners could obtain for their tobacco on the tobacco markets in Central Kentucky.

The District Court, in a memorandum opinion dated June 28, 1989, dismissed the complaint on grounds that the action is barred by the Act of State Doctrine, and that a private plaintiff has no standing to bring this action under the Foreign Corrupt Practices Act of 1977. The Sixth Circuit Court of Appeals reversed the District Court on the Act of State Doctrine, and sustained the court on The Foreign Corrupt Practices Act.

1. DOES AN IMPLIED PRIVATE RIGHT OF ACTION EXIST UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, AS CODIFIED AT 15 U.S.C. §§78dd-1 and 78dd-2?

The Foreign Corrupt Practices Act of 1977 (FCPA) was passed as a consequence of revelations of foreign and domestic bribes, kickbacks, political payoffs and other questionable financial practices by corporations. It is an amendment to the Securities Exchange Act of 1934. Title I of the 1977 amendment requires issuers of most publically traded securities to comply with specific accounting standards, and provides for civil and criminal liability when an "issuer" or any domestic concern not an issuer uses the mails or any instrumentality of interstate commerce in furtherance certain payoffs "to any foreign official, person, political party, or official therof, or to any [foreign] candidate..."Title II of the legislation deals with required reporting of foreign ownership of domestic corporations.

In the legislative history of the FCPA the House of Representatives report adopted a position stating that the House committee specifically intended the courts to imply a private right of action on behalf of persons who suffer injury from corporate bribery. The language is unequivocal:

> The committee intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange act, on behalf of persons who suffer injury as a result of prohibited corporate bribery. The recognition of such a private cause would enhance the deterrent effect of this legislation and provide a necessary supplement to the enforcement efforts of the Commission and the Department of Justice. (H.R.Rep. No. 640, 95th Cong. at page 10.)

The Securities Exchange Commission has taken the position that the House-Senate Conference Committee adopted the House version of the bill because of its silence on this issue in face of the House report specifically endorsing such a private

right of action.[1] Cognizant that SEC Rulings are not always easily available to a reviewing justice, we have appended a copy of the cited opinion of the General Counsel in Appendix III to this petition.

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[1](1978) 466 SEC. Reg. and L. Rep. (BNA) A-7 (statement of SEC General Counsel Harvey Pitt); (1978) 452 SEC. Reg. and L.Rep. (BNA) A-6 (statement of Harvey Pitt); (1978 Transfer Binder) Fed. SEC. L.Rep. (CCH) §81, 701 (SEC Opinion Letter); (1978) 441 SEC. Reg. and L.Rep. (BNA) G-1 (SEC Release No. 34-14, 478). In addition, the Chairman of the SEC, Harold M. Williams, declared both in his testimony and his prepared statement that "(T) his legislation would furnish the Commission and private plaintiffs (in implied actions) with potent new tools to employ against those who persist in concealing from the investing public the manner in which corporate funds have been utilized." Chairman Williams' view is particularly significant since the Court has recognized that the views of an administrative agency are entitled to particular weight where, as here, "the administrators participated in drafting (the legislation) and directly made known their views to Congress in committee hearings."

One of the primary reasons why this court should grant certiorari in this case is the clear conflict in the understanding about the existence of such private actions between the SEC and the United States Department of Justice. In its amicus curiae brief to this court in Environmental Techtonics Corporation International V. W.S. Kirkpatrick & Company, Inc., ___U.S.____, 110 S.Ct. 701, 107 L.Ed 2d 816 (1990), the Solicitor General argued that:

> [T]he prohibited-payment provisions of the FCPA were not enacted for the especial benefit of competitors. Rather, Congress sought to benefit the Nation as a whole, by promoting what it believed to be the Nation's foreign policy interests and the interests and the interests of the entire business and financial community.[2]

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[2]Brief for the United States as amicus curiae at 35, Environmental Techtonics Corporation, supra. very notably, the underpinning rationale for this position of the Solicitor General was that "litigation...based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on national nerves that the Act of State Doctrine or related principles of abstention would appropriately be found to bar the suit." This quoted reasoning was specifically rejected out of hand by Justice Scalia speaking for the unanimous court in Environmental Techtonics, supra, at page 706 of the opinion.

The SEC and Justice Department conflict does not, however, fully illuminate the extensive Congressional debate over whether there should be a private right of action under the act. For a thorough tracing of the legislative history of this aspect of the Act, we commend to the court the splendid law journal note of Professor Mary Siegel, of The American University College of Law: "The Implication Doctrine and the Foreign Corrupt Practices Act," 79 Colum. L. Rev. 1085 (1979). Professor Siegel concludes that an implied private action for injunctive relief should apply to the bribery provisions of the Act, but not to the accounting provisions. Her reasons are cogent. Supra at page 115f.

Very frankly, it is the private action for injunctive relief which petitioners Lamb and Willis seek most earnestly from this court. (Monetary damages, obviously, are more generously compensated under an antitrust theory.) If permitted to do so, petitioners

will argue to this court that a different, and a more relaxed, standard for implication of private causes of action should exist for injunctive relief just as it exists for conferring standing to enjoin other threatened injuries.[3]

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[3]The Supreme Court has noted in United States v. Scrap, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973):

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see Baker v. Carr, 369 U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663 (1962)]; a $5 fine and costs, see McGowan v. Maryland, 366 U.S. 420 [81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)]; and a $1.50 poll tax. Harper v. Virginia Bd. of Elections, 383 U.S. 663 [86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)]... As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613. See Also K. Davis, Administrative Law Treatise §§ 22.09-5, 22.09-6 (Supp. 1970).

Other than the Sixth Circuit in the case at hand, no court has yet faced squarely the issue of whether private rights of action exist for parties injured by payments proscribed by the FCPA. In several cases, however, federal courts have reached conflicting views on closely related implied actions under the FCPA. In three decisions, federal courts have permitted a defendant to raise the defense of violation of the FCPA by a plaintiff as an affirmative defense denying recovery as a violation of public policy. Cf. Sedco Intern., S.A. v. Cory, 683 F.2d 1201, 1210. (8th Cir. 1982): Instituto Nacional v. Continental Illinois National Bank, 576 F.Supp. 985, 990 (N.D. Ill., 1983); Northrop Corp. v. Triad Financial Establishment, 593 F.Supp. 928 (C.D. Cal. 1984). In the Continental Illinois case this was recognized as embodying the same issues as whether to grant a private right of action (at page 900).

In two other cases interpreting Title II of the FCPA dealing with the required disclosure of foreign ownership of stock in United States Companies the courts found an implied private right of action on the grounds that such had been judicially recognized in similar portions of the 1934 act prior to its 1977 amendment. Significantly, both these courts looked at the legislative history of the 1977 amendments (i.e. the very same legislative history which Title I of the act dealing with the bribery provisions is based) and found that Congress had intended to permit private causes of action in its 1977 amendment. Cf. Indiana National Corp. v. Rich, 712 F.2d 1180, 1184 (7th Cir. 1983), and Jacobs v. Pabst Brewing Co., 549 F.Supp. 1050, 1062.

Judge Guy, writing for the Sixth Circuit in the case at bar, candidly acknowledged that his holding is in direct conflict with the holding in Jacobs, supra. at page 1029 of his opinion, footnote 12.

Four other federal courts, looking at different provisions of the 1977 amendment (but at the same legislative history) have concluded that no private cause of action was intended. Cf. McLean v. International Harvester Co., 817 F.2d 1214 (5th Cir. 1987); Lewis v. Sporck, 612 F.Supp. 1316 (N.D. Cal. 1985); Eisenberger v. Spectex Industries, Inc., 644 F.Supp. 48 (E.D.N.Y. 1986); Shields v. Erickson, 710 F.Supp. 686 (N.D. Ill. 1989).

The conflict in the circuits on this issue warrants an opinion by the Supreme Court resolving the question.

2. DOES THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, AS CODIFIED AT 15 U.S.C. §6a (1982), MAKE MORE STRINGENT THE JURISDICTIONAL STANDARD FOR AN ANTITRUST COMPLAINT ALLEGING A CONSPIRACY TO FIX PRICES OF IMPORTED COMMERCE?

In their briefs before both courts below, both defendants and plaintiffs concurred that the Foreign Trade Antitrust Improvements Act of 1982 is no model of legislative clarity.

Its parenthetical phrase "...(other than import trade or import commerce),..." gave counsel for each party long periods of reflection. Interestingly,the defendants, themselves, in their briefs arrived at radically different understandings of the meaning of this language. Defendant/Appellee B.A.T. Industries, PLC agreed with the plaintiffs that: "The FTAIA does not limit subject matter jurisdiction in antitrust cases involving import trade or import commerce". Cf. Brief for B.A.T. Industties, PLC before the Sixth Circuit Court of Appeals at 19. Lamb No. 89-5960. B.A.T. then argued that its complained-of activities were properly characterized as export commerce, and were thereby governed by the stringent jurisdictional standards of the FTAIA.

Defendant/Appellee Philip Morris, on the other hand, took the position that the FTAIA clarifies subject matter jurisdiction for all international business transactions, including

acts that restrain imports. Philip Morris cited various excerpts from the legislative history of the act and a quotation from the head of the Antitrust Division of the Department of Justice to support its position, that plaintiffs' complaint, which dealt with alleged import restrains as PMI saw it, was governed by the act. Cf. Brief for Philip Morris, Inc. before the Sixth Circuit Court of Appeals at 18f, Lamb No. 89-5960.

There is no question that the act will have a heavy impact on many antitrust complaints filed after its effective date of October 8, 1982. Few activities of multinational corporations can be said not to arguably involve "trade or commerce with foreign nations". If all such activities, including per se violations of the Sherman Act, must have "a direct, substantial and reasonably foreseeable effect" on commerce to be justiciable, the door has indeed been opened wide to encourage many

many activities formerly subject not only to treble damages, but to criminal sanctions as well. Particularly is the foreseeability standard problematic, since it insulates subjective wrongful motives of defendants from inquiry.

The issue at bar is whether the language of the act and its legislative history substantiate application of the standards of the law to import related trade or commerce, as Philip Morris earnestly asserts. If this is true, successful antitrust suits involving foreign trade will be virtually legislated out of the courts.

On the contrary, if the parenthetical language of the act is taken in its plain, unvarnished meaning, the words seem to say that Congress intended that the Sherman Act should apply to activities in foreign countries that have no direct, substantial or reasonably foreseeable effect on import trade or import commerce!

This would, of course, make less strict, not more stringent, the standards for justiciability of an import related antitrust activity. Petitioners would argue that the legislative history of the act contemplates this interpretation.

In any event, the statute is a very crucial piece of legislation involving not only the case at bar but all future foreign trade antitrust suits. There is presently no federal case, district court or appellate court, construing its abstruse language.

An interpretation by this court is called for.

CONCLUSION

In light of the need for a resolution in the conflict in interpretations among the circuits, and between the SEC and the Justice Department, regarding the existence of private causes of action under the FCPA, this Honorable Court is urged to approve this Petition.

In light of the heavy implications not only for the case at bar, but for all future antitrust complaints involving foreign trade, this court is urged to give guidance to interpretation of the FTAIA by addressing the meaning of the parenthetical phrase in the act "...(other than inport trade or commerce),..."

Petitioners therefore respectfully request that this Petition be approved, and that a writ of certiorari be granted.

Dated: Richmond, Kentucky, December 7, 1990.

Respectfully submitted,

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Petitioners